

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MANUEL GONZALES,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DE07528910241

DATE: APR 09 1990

Manuel Gonzales, Albuquerque, New Mexico, pro se.

Louis J. Garcia, Albuquerque, New Mexico, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the administrative judge's July 25, 1989, decision dismissing his appeal as moot. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision and REMAND this case to the Denver Regional Office for further proceedings in accordance with this Opinion and Order.

BACKGROUND

On April 17, 1989, the appellant filed a timely appeal of an adverse action demoting him from Personnel Assistant,

EAS-11, to Distribution Clerk, PS-5. During a status conference on June 7, 1989, the agency informed the administrative judge that it was withdrawing the charges and canceling the demotion. See Appeal File, Tab 14. The administrative judge then ordered the agency to show that the appellant had been returned to the status quo ante. *Id.* The material filed by the agency still reflected the adverse action and the appellant objected. See Appeal File, Tab 20. The administrative judge agreed that the inclusion of the documentation of the demotion in the appellant's personnel record did not return him to the status quo ante. On June 21, 1989, the administrative judge ordered the agency to prove that the appellant's personnel record had been corrected. See Appeal File, Tab 21. The agency failed to do so, and on July 5, 1989, the administrative judge rescheduled the hearing. See Appeal File, Tab 23.

On July 18, 1989, the agency representative submitted a letter and supporting "Notification Of Personnel Action" forms indicating that the appellant's personnel record had been corrected. The administrative judge then dismissed the appeal on July 25, 1989. See Appeal File, Tab 27.

In his petition for review, the appellant contends that the administrative judge erred in dismissing the appeal since the agency did not properly correct his personnel record. He also contends that: 1) the agency subsequently improperly evaluated his performance thereby denying him a merit increase in retaliation for filing the appeal; 2) the agency failed to

reassign him to the same position; 3) the agency failed to answer his Freedom of Information Act and Privacy Act requests; and 4) the agency failed to properly handle his Equal Employment Opportunity complaint.¹

ANALYSIS

The appellant, in his petition for review, asserts that the agency failed to remove all references to the demotion from his personnel record. The agency, in a letter dated July 18, 1989, contends that the computerized personnel record system does not allow for changes in an employee's service history. The agency's solution was to white-out the demotion on each printout of the record. According to the appellant, the adverse action was not completely concealed by the white-out and on some of the records the action had not been whited-out.

The issue that must be resolved is whether the administrative judge erred in finding that the agency had rescinded the demotion by restoring the appellant to the status quo ante.²

When an agency is ordered to cancel an action, all references to such action must be removed from the appellant's personnel record. See *Dancer v. United States Postal Service*,

¹ The appellant submitted correspondence entitled "Reply to Agency's Response to Appellant Petition For Review." The Board's rules do not provide for any submissions beyond the petition and response; therefore, this submission has not been considered. 5 C.F.R. § 1201.114.

² In view of our determination that the appeal must be remanded, we do not here reach the other issues raised by the appellant.

36 M.S.P.R. 235, 238 (1988), *rev'd on other grounds*, 38 M.S.P.R. 224 (1988); *Kellus v. United States Postal Service*, 35 M.S.P.R. 335, 339 (1987). When the agency itself elects to cancel the adverse action, we see no basis on which to find that return to the status quo ante does not require the same.³ See *Guy v. Department of Energy*, 37 M.S.P.R. 230, 232 (1988) (agency's failure to rescind cancelled action completely results in the Board's retention of jurisdiction).

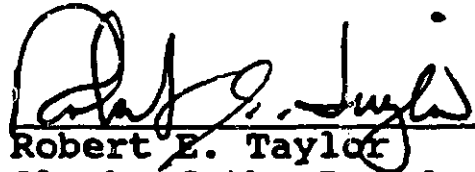
Since the computer record still contains reference to the demotion, all references to the adverse action have not been removed from the appellant's personnel record, and contrary to the administrative judge's finding, the appellant has not been returned to the status quo ante. Absent a settlement agreement that has been entered into the record, the Board may not order compliance in a matter that has not been heard on the merits. *Yuni v. Small Business Administration*, 38 M.S.P.R. 574, 575 (1988). The merits of appellant's appeal have not been adjudicated by the Board. Thus, the proper remedy in this case

³ The Federal Personnel Manual (FPM) provides guidance on personnel matters to most executive branch agencies. While the Board has not decided whether the FPM provisions concerning the cancellation of actions apply to the United States Postal Service, and we do not reach that issue here, we do find it instructive. See *Labadie v. United States Postal Service*, 20 M.S.P.R. 28 (1984). We note that the FPM makes no distinction between actions ordered canceled by the Board and actions voluntarily canceled by the agency in requiring that all references to a canceled personnel action be deleted from automated personnel records. See FPM 296-10.

is to reopen this appeal and remand it to the Denver Regional Office for adjudication.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board